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No. 06-8120

In The Supreme Court of the United States

BRUCE EDWARD BRENDLIN,

Petitioner,

v.

CALIFORNIA,

Respondent.

On Writ of Certiorari to the California Supreme Court

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether a passenger in a vehicle subject to a traffic stop is thereby "detained" for purposes of the Fourth Amendment, thus allowing the passenger to contest the legality of the traffic stop.

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STATEMENT OF THE CASE

1. At 1:30 a.m. on November 27, 2001, sheriff's deputy Robert Brokenbrough observed a car with expired registration tags traveling on South Barrett Road in Sutter County, California. (JA 34-35, 49.) Deputy Brokenbrough confirmed by police radio that the tags had expired and that an application for new registration was pending. (JA 45.) While following the car the deputy saw in its rear window a temporary operating permit marked with the number 11, representing the month of November and meaning that the temporary permit was good until the last day of the month. Deputy Brokenbrough had prior experience with people switching temporary operating permits from one car to another to avoid fines for expired registrations. He believed he needed to make sure that the permit actually belonged to the vehicle on which it was displayed. (JA 48, 50, 60-63.)

Deputy Brokenbrough "made a traffic stop on the vehicle." (JA 36.) He activated his patrol car's overhead lights to signal the driver to stop. The driver complied and stopped the car. (JA 49-50.) Deputy Brokenbrough pulled in behind the car and shined a spotlight on it in the night. (JA 50, 54.) Then he approached the driver's side of the vehicle and asked for the driver's license. The driver provided her license, which identified her as Karen Simeroth. (JA 37.) At that point, the deputy noticed one or two containers of a cleaner that, in his knowledge, was used in the manufacture of methamphetamine. (JA 40.) While still engaged with Simeroth, Deputy Brokenbrough asked petitioner Brendlin—the sole passenger, seated in the front seat—to identify himself. Petitioner falsely identified himself as "Bruce Brown." (JA 37.)

Deputy Brokenbrough, however, recognized petitioner as one of the Brendlin brothers, either Bruce or Scott. (JA 37.) He was also aware that one of the brothers was a parolee-at-large. (JA 37-38.) He ran a police radio check on petitioner; the dispatcher confirmed that petitioner indeed was a parolee-at-large. (JA 38.) While obtaining this information, Deputy Brokenbrough saw petitioner open the passenger door but remain in his seat. (JA 38-39.) Shortly, within a couple of minutes from when he asked Simeroth for her license, the deputy also was informed that there was a warrant out for petitioner's arrest. (JA 38.)

Deputy Brokenbrough requested back-up and, when other officers arrived, he ordered petitioner out of the car at gunpoint and arrested him under the warrant. (JA 39.) A search of petitioner revealed a syringe cap. (JA 39-40.) A pat-down search of Simeroth, undertaken for reasons of officer safety, yielded two syringes and a green leafy substance. (JA 41-43.) Simeroth then was arrested too. (JA 43.) Following Simeroth's arrest, Deputy Brokenbrough searched the car. On the front seat, between where the driver and a passenger would sit, he found a container of "tubing, a scale, and other items" related to the manufacture of methamphetamine. (JA 43-45.)

2. Petitioner was charged, in three counts, with possessing, transporting, and manufacturing methamphetamine. At his trial, he moved to suppress the evidence discovered at the scene of his arrest on the ground that his Fourth Amendment rights had been violated. After a hearing, the trial judge denied his motion. The judge concluded that the traffic stop was not unreasonable; that petitioner was free to leave once the car was stopped and was not detained until Deputy Brokenbrough ordered him out of the car and arrested him on the warrant; and that

petitioner lacked "standing" to bring a motion to suppress the items found in the car. (JA 85.) Following the denial of his suppression motion, petitioner entered a negotiated plea of guilty to manufacturing methamphetamine. (JA 87-98.) He was sentenced to an agreed-upon term of four years in state prison. (JA 96-97.)

3. On appeal, petitioner asserted that the trial court had erred in denying his suppression motion. The California Court of Appeal agreed and reversed the judgment. The appellate court held that a passenger is detained within the meaning of the Fourth Amendment when the car in which he is riding is subjected to a routine traffic stop, at least during the actual stopping of the vehicle. *People* v. *Brendlin*, 8 Cal.Rptr.3d 882, 886 (Cal. Ct. App. 2004). (JA 108.) The court also concluded that the passenger in such a situation may challenge the lawfulness of the vehicle stop. *Id.* at 887. (JA 109.) The court further ruled that the traffic stop in petitioner's case was unlawful because the circumstances were insufficient to support a reasonable suspicion of criminal activity. *Id.* at 887-88. (JA 109-10.) Finally, the appellate court ruled that, since the evidence seized from petitioner would not have been discovered but for the unlawful stop, it should have been suppressed. *Id.* at 888. (JA 111.)

The State appealed, and the California Supreme Court granted review. (JA 112.) The State conceded that the traffic stop had not been supported by reasonable suspicion of criminal activity. (JA 119). But the State argued that petitioner, as a passenger, had not been "seized" within the meaning of the Fourth Amendment merely by the stopping of the car in a routine traffic stop. In the State's view, petitioner was not seized until Deputy Brokenbrough ordered him out of the car at gunpoint and

arrested him pursuant to the outstanding warrant. (JA 119). The State further argued that, even if petitioner had been unlawfully seized prior to the discovery of the warrant, the challenged evidence was properly admissible as the product of an intervening lawful search incident to his arrest under the warrant.

The California Supreme Court reversed the judgment of the intermediate appellate court. The state supreme court held that, even though his progress is momentarily stopped as a practical matter, a passenger in a car subjected to a traffic stop is not seized as a constitutional matter in the absence of additional circumstances that would indicate to a reasonable person that he or she was the subject of the peace officer's investigation or show of authority. *People* v. *Brendlin*, 136 P.3d 845, 846 (Cal. 2006). (JA 114.) The court therefore concluded that petitioner was not "seized" when the driver submitted to the police officer and brought the car to a stop. *Id.* at 855. (JA 132.) Because the court decided that petitioner's Fourth Amendment rights had not been implicated by the car stop, it did not reach the State's alternative argument that, even if the stop of the car had subjected petitioner to an unlawful seizure, his later arrest under the pre-existing warrant purged any taint from the stop so that the evidence was not subject to suppression in any event.

SUMMARY OF ARGUMENT

1. As a mere passenger in the car when the driver was stopped by the police in a routine manner for a traffic violation, petitioner was not thereby "seized" within the meaning of the Fourth Amendment. Contrary to

petitioner's one-dimensional argument, whether the passenger's freedom of movement was affected as a factual matter is not the determinative legal question. Rather, a person is "seized" within the meaning of the Fourth Amendment during a contact with police only if (1) the objective circumstances show that the police officer willfully directed at the person a show of authority or use of force, (2) the police actions would have communicated to a reasonable, innocent person that he or she was not free to decline the officer's requests or otherwise terminate the contact, and (3) the person in fact was restrained or submitted to a show of authority. Under these correct standards—drawn from a logical extension of this Court's decision in *Brower* v. *County of Inyo* and from its holdings in *Florida* v. *Bostick* and *California* v. *Hodari D.*—the routine stop of the car in which petitioner was traveling as a passenger did not result in his "seizure."

When Deputy Brokenbrough activated the lights of his patrol car to order driver Simeroth to pull over, in a routine manner typical of traffic-violation stops, the objective facts showed that it was the driver who was the object of the deputy's command. Absent anything more, the simple show of authority used by the deputy in this case could not reasonably be said to be directed at petitioner, a mere passenger in the car. Any effect on petitioner was unintended and coincidental. Like a merely accidental interference with a person's movements, and like many unremarkable official commands that commonly delay travelers on the road, the unintended or coincidental effect on petitioner's movement caused by the stop of the car in this case did not amount to a "seizure" in the constitutional sense.

Even if such a show of authority were deemed to extend to passengers in the car, it would nevertheless remain true that only the driver would thereby be seized under the Fourth Amendment. Certainly, Simeroth was seized, because no reasonable person in her position would have felt free to disregard the officer's command to pull over the vehicle, and she in fact submitted to that request. But petitioner's situation was completely different. During the initial stopping of the vehicle, there was no encounter between the officer and petitioner. The deputy asked nothing of petitioner; and the deputy's action in stopping the car did not compel or coerce him to do anything.

Moreover, and typical for a mere passenger, petitioner himself did not submit to any request or order given by the officer in the stopping of the car. Only driver Simeroth was in control of the car. Absent physical restraint—and none was used in this case—a seizure requires a submission to a show of authority. Petitioner was not "seized" until Deputy Brokenbrough ordered him out of the vehicle at gunpoint and arrested him under the warrant. Any evidence obtained from petitioner was properly seized in a search incident to that lawful arrest and cannot be subjected to suppression under the Fourth Amendment exclusionary rule.

2. Even if petitioner had been unlawfully "seized" by the traffic stop alone, the challenged evidence in this case would remain admissible. Petitioner's subsequent arrest, and the search of his person and the vehicle, were the immediate result of the intervening radio report of petitioner's outstanding arrest warrant. The discovery of the challenged evidence in those searches was sufficiently attenuated from the traffic stop so as to dissipate any taint

from it. Application of the Fourth Amendment exclusionary rule, therefore, would not be justified.

ARGUMENT

I. AS A PASSENGER, PETITIONER WAS NOT "SEIZED" UNDER THE FOURTH AMENDMENT MERELY BY THE POLICE STOP OF THE CAR IN A ROUTINE MANNER

The Fourth Amendment to the United States Constitution provides that people shall "be secure in their . . . persons against unreasonable searches and seizures." U.S. Const., Amend. IV. But consensual encounters or otherwise inoffensive contacts between law enforcement and the public not amounting to a "seizure" do not implicate the Fourth Amendment. See *Florida* v. *Bostick*, 501 U.S. 429, 434-35 (1991); *United States* v. *Mendenhall*, 446 U.S. 544, 554-55 (1980) (plurality opinion).

The question before this Court is "whether a passenger in a vehicle subject to a traffic stop is thereby 'detained' for purposes of the Fourth Amendment, thus allowing the passenger to contest the legality of the traffic stop." The answer depends upon whether the passenger was "seized" within the meaning of the Fourth Amendment by the police action in stopping the vehicle. Petitioner asserts that resolution of the issue is "straightforward." Petr.'s Br. 9. However, as with most questions that reach this Court, the correct answer is not a superficial or simple one.

In petitioner's view, similar to assumptions made by a number of courts, any purposeful interference with a passenger's liberty interest in his freedom of movement settles the "seizure" inquiry. See Petr.'s Br. 21-22; *People*

v. *Brendlin*, 136 P.3d at 850-51 (citing cases). (JA 122-23.) But petitioner's contention ignores the everyday realities of modern day life. On a busy one-lane road, a police investigatory stop of one car might impede the freedom of movement of the occupants of many other cars. It would be implausible, however, to assert that all those occupants—some of whom might be so far away that they would not even know the cause for their delay—have been "seized" by the police. Similarly, when the police turn away automobile traffic after a collision, they interfere with the freedom of movement of those whose vehicles they redirect—but they do not "seize" all of those people. Stop signs, speed limits, and other means of controlling the movement of automobiles on the highway, are pervasive reminders that nobody, passenger or otherwise, reasonably may expect complete freedom of movement without governmental interference in a motor vehicle on the highway. See *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561-62 (1976); *South Dakota* v. *Opperman*, 428 U.S. 364, 368 (1976).

The answer to the question of whether petitioner was "seized" by the police action in stopping the car in which he was traveling does not follow automatically from petitioner's simple assertion that his freedom of movement was affected. Rather, the answer follows from the application of principles underlying this Court's decisions that distinguish "seizures" in the constitutional sense from other police-citizen contacts not implicating the Fourth Amendment. Under those principles, as identified below, a

passenger such as petitioner is not "seized" merely by the routine traffic stop[1] of the vehicle in which he is traveling.

A. A Person Is Not "Seized" Unless The Police Willfully Use Force Or Direct A Show Of Authority At Him

The logic and the development of this Court's definition of a "seizure," as reflected in a comparison between *Terry* v. *Ohio*, 392 U.S. 1 (1968), and *Brower* v. *County of Inyo*, 489 U.S. 593 (1989), support the principle that a person is not "seized" for Fourth Amendment purposes unless, based on the objective facts, the police willfully use force against him or direct a show of authority at him. An incidental interference with the liberty of an unintended object of the police conduct—similar to an accidental interference with a person's liberty—should not be deemed a "seizure" in the constitutional sense.

1. In *Terry*, the defendant was grabbed by an officer who then frisked him for weapons. This Court made it clear that such physical restraint constituted a Fourth Amendment "seizure." 392 U.S. at 15-16; accord, *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878 (1975). In the case at bar, petitioner Brendlin cites a broader assertion from *Terry*—that a seizure takes place whenever an officer's actions result in a restriction on a person's liberty. See Petr.'s Br. at 9, 19, 22 (citing *Terry*, 392 U.S. at 19 n.16.) But, in *Brower*, the Court limited this broad

[1] By "routine traffic stop," the State means those stops in which the police in a single patrol vehicle use their lights and/or siren to order a driver to stop and the driver complies. The State also describes this type of stop as a routine manner stop.

assertion in *Terry* by explaining that "seizures" must in some sense be "intentional." 489 U.S. at 596.

2. In *Brower*, a driver was killed when he crashed his car into a police roadblock. This Court concluded that the police action in placing the roadblock indeed had subjected the driver to a "seizure" in the constitutional sense. *Id.* at 599. However, the Court also explained:

> [A] Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement . . . nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement . . . but only when there is a governmental termination of freedom of movement *through means intentionally applied.*

Id. at 596-97 (emphasis in original).

Brower in this way limited the broader *Terry* language, on which petitioner relies, that any restriction on a person's liberty constitutes a Fourth Amendment "seizure." Instead, a "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control." *Brower*, 489 U.S. at 596. That is, the Fourth Amendment is concerned only with intentional governmental action that restricts a person's liberty.

In explaining this limitation, the Court in *Brower* distinguished purposeful police conduct from police conduct that only accidentally impairs a person's freedom. The latter, the Court indicated, would not amount to a "seizure." *Brower*, at 596. For "[t]he Fourth Amendment addresses 'misuse of power,' not the accidental effects of otherwise lawful conduct." *Id.* (citation omitted) "The writs

of assistance that were the principal grievance against which the Fourth Amendment was directed did not involve unintended consequences of government action." *Id.* (citations omitted).

Consistent with the limited purposes of the Fourth Amendment, *Brower* logically may be extended to support the conclusion that a person is not "seized" unless police action is willfully directed at him. The concept of a Fourth Amendment seizure does not embrace "an unknowing act." *Brower*, at 596. *Brower* indicated the significance of ascertaining the object of a police officer's action when it confirmed that "a seizure occurs even though an unintended person or thing is the *object* of the detention or taking." *Id.* at 596. (emphasis added). Coincidental effects of police activity on a person who is not the "object" of the police conduct reasonably may be treated as "unintended consequences." Such a person would not be the object of "intentional acquisition" of control by the officer. Any restriction on such person's liberty would be accidental or coincidental.

Petitioner ostensibly relies on the same language from *Brower*—that "[a] seizure occurs even though an unintended person or thing is the object of the detention or taking"—but he misuses it as if it had addressed "unintended persons" who were *not* the objects of the detention. Petr.'s Br. 17. Instead, the Court simply was illustrating that willful police conduct in physically grasping the body of a person amounts to a seizure of that person, even in a case of mistaken identity, for the physical being or person captured still clearly remains the *object* of the police action. *Brower*, 489 U.S. at 596 (citing *Hill* v. *California*, 401 U.S. 797 (1971)). That situation is very different from one in which the police purposely stop

the driver, and the stopping of the car happens to incidentally affect a passenger who was not the *object* of the police action.

The proposition that a person is "seized" only if he or she is the object of willful police action is supported by other statements by the Court in *Brower*. The Court stated:

> We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result. It was enough therefore, that . . . Brower was meant to be stopped by the physical obstacle of the roadblock and that he was so stopped.

Brower, 489 U.S. at 599. In other words, Brower was seized not because the police acted deliberately in placing the roadblock, but because they acted deliberately *to stop Brower* by placing the roadblock. He was the intended object of the police action in placing the roadblock, and that roadblock terminated his movement.

3. Given the "intentional governmental action" limitation on the Fourth Amendment recognized in *Brower*, it also makes sense to recognize that a "seizure" requires not merely that the police conduct is undertaken deliberately but also that it is directed at a particular person. Incidental intrusions are similar to accidental intrusions on liberty, which are not "seizures." As with accidental intrusions, an incidental or coincidental interference with a person who is not the object of police conduct is also an "unintended consequence of government action."

For example, if the police stop person A's car on a one-lane road and thereby interfere with the freedom of movement of person B, whose vehicle is blocked by A's car,

the restriction on B's liberty is not the intended consequence of the police action regardless whether the police conduct was purposeful rather than accidental. In the example, A is "seized" because he is the object of willful police action. Person B, however, should not be deemed "seized": although the police acted deliberately and that deliberate action restricted his liberty, the police action was not directed at B.[2] The restriction on B's liberty is, in the language of *Brower*, an "unintended consequence of government action." 489 U.S. at 596. "It is intervention directed at a specific individual that furnishes the basis for a Fourth Amendment claim." *Landol-Rivera* v. *Cruz Cosme*, 906 F.2d 791, 794-96 (1st Cir. 1990); see *Maryland* v. *Wilson*, 519 U.S. 408, 420 (1997) (Stevens, J., dissenting).

4. Extending the *Brower* analysis, to require that police action be directed at a particular person before he or she may be deemed "seized," would also distinguish Fourth Amendment seizures from everyday occurrences

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[2] Petitioner mistakenly asserts that taking account of the object of a police officer's actions would inappropriately inject the issue of the officer's subjective intentions into the resolution of the question whether a "seizure" occurred. Petr.'s Br. 17. Determining the object of the police action requires, instead, an evaluation of the outward objective circumstances. The officer's subjective intentions are irrelevant to that objective inquiry. Petitioner is also incorrect in suggesting that the California Supreme Court said anything to the contrary in this case. See *Brendlin*, 136 P.3d at 851 (JA 124) (considering facts of stop and determining that officer's actions were directed at driver); see also *People* v. *Jackson*, 39 P.3d 1174, 1185-86 (Colo. 2002) (same). In any event, as this Court has indicated, the officer's subjective intentions may become relevant when they are communicated to citizens interacting with the officer. Communication of the officer's intentions of course may affect the reactions of the reasonable person. See *Mendenhall*, 446 U.S. at 554, n.6.

such as a police officer redirecting traffic at an accident scene or inadvertently delaying others in the course of investigating crime. The citizens whose free movement is affected in such instances are not thereby "seized" under the Fourth Amendment. See *Wilson*, 519 U.S. at 420 (Stevens J., dissenting). Even though the officer's actions are undertaken deliberately, and the impact on the affected citizens' movements is no accident, the officer objectively manifests no purpose or intention to affect the movement of any particular person as an individual.

5. Thus, *Brower* tends to support, and logic reinforces, the validity of the principle that a "seizure" requires that the police action was directed at the person who is claiming the protections of the Fourth Amendment. See *Wilson*, 519 U.S. at 420 (Stevens, J., dissenting). This principle, would apply equally to a case involving application of physical force as in *Brower*, see 489 U.S. at 596-98, and to a case, such as the one at bar, which involves a police show of authority carried out by the well-recognized command implicit in a police officer's activation of the overhead lights on his patrol car. See *id.* at 597 (attempting to stop a car by flashing lights and pursuit is a show of authority.); *California* v. *Hodari D.*, 499 U.S. 621, 628 (1991) (same). It would make little sense to say that seizures by physical force must be directed at a particular person to implicate the Fourth Amendment but those effectuated through a show of authority may occur inadvertently or incidentally. Cf. W.R. LAFAVE, SEARCH & SEIZURE, § 2.1 (a) (4th ed. 2004) (implying that *Brower* applies to all seizures).

B. A Person Is Not Seized Unless The Conduct Of The Police Would Have Communicated To A Reasonable, Innocent Person That He Was Not Free To Decline The Officer's Requests Or Otherwise Terminate The Contact

Although necessary, it is not enough, in determining if a "seizure" occurred, to identify who was the object of a police show of authority under the principles outlined above. The police contact with that person must be evaluated further to see if it would have communicated to a reasonable, innocent person that he or she was not free to decline the officer's requests or otherwise terminate the contact. Under this standard, a passenger in a car stopped in the manner typical for traffic violations ordinarily would not be "seized."

The standard derives from *United States* v. *Mendenhall*, 446 U.S. 544, which involved a police-citizen contact at an airport, and from *Florida* v. *Bostick*, 501 U.S. 429, which involved a police contact with a passenger aboard a bus. In these cases, the question was whether the police conduct, although short of physical restraint, nevertheless was so coercive as to constitute a Fourth Amendment "seizure." In analyzing this particular issue, the Court viewed the police-citizen encounter from the perspective of a reasonable citizen. *Mendenhall*, 446 U.S. at 553-56; *Bostick*, 501 U.S. at 434-38. In *Mendenhall*, Justice Stewart's plurality opinion endorsed a coercive-effect inquiry aimed at determining whether a reasonable person under the circumstances would "feel free to leave." Only when a hypothetical reasonable person would feel unable to leave could the encounter be deemed so coercive as to constitute a restriction on a citizen's liberty and thus a Fourth Amendment "seizure." *Mendenhall*, 446 U.S. at 554; see

also *Michigan* v. *Chesternut*, 486 U.S. 567, 573-74 (1988); *I.N.S.* v. *Delgado*, 466 U.S. 210, 216 (1984); *Florida* v. *Royer*, 460 U.S. 491, 501-02 (1983) (applying *Mendenhall* test).

In *Bostick*, this Court refined the *Mendenhall* test to more fully encompass all the situations in which police encounter citizens. The *Bostick* Court asked whether, in considering all of the circumstances surrounding the encounter, the reasonable, innocent citizen would feel unable to decline the officer's requests or otherwise terminate the encounter. 501 U.S. at 438-40. The Court considered this new standard to be a more accurate gauge of whether, even in the absence of physical restraint, the police-citizen contact was so coercive as to result in a "seizure." This was a more accurate inquiry, the Court indicated, because there are some circumstances in which a citizen's desire not to leave the scene would be attributable to factors other than coerciveness in the police conduct. See *id.* at 435-36. The Court noted that,

> the mere fact that Bostick did not feel free to leave the bus does not mean that the police seized him. Bostick was a passenger on a bus that was scheduled to depart. He would not have felt free to leave the bus even if the police had not been present. Bostick's movements were 'confined' in a sense, but this was the natural result of his decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive.

Id. at 436. The Court in *Bostick* also affirmed that its revision of Justice Stewart's *Mendenhall* inquiry was applicable to all police-citizen encounters. 501 U.S. at 439-40; see also *United*

States v. *Drayton*, 536 U.S. 194, 201-06 (2002) (applying *Bostick* test).

C. A Person Is Not Seized Unless He In Fact Is Restrained Or Submits To A Show Of Authority

Finally, in *California* v. *Hodari D.*, 499 U.S. 621, this Court confirmed that even more is required to comprise a Fourth Amendment "seizure." *Hodari D.* requires considering the reactions of the particular citizen in response to the police actions. The Court in *Hodari D.* determined that actual submission was required before that person could be "seized" within the meaning of the Fourth Amendment. *Id.* at 626. The concept of a Fourth Amendment "seizure" does not extend, the Court emphatically declared, "to the prospect of a policeman yelling 'Stop in the name of the law!' at a fleeing form that continues to flee." *Id.* Attempts to seize a person were not "seizures" unless they were successful. The Court's ruling thus implied that, no matter how coercive the police action might appear to the reasonable citizen, there would be no "seizure" under the Fourth Amendment if it did not coerce the citizen at whom it was directed.

As *Hodari D.* made clear, to say that a reasonable, innocent person would not have felt free to decline the police requests or terminate the encounter under the *Mendenhall-Bostick* standard would be to state a necessary but not sufficient condition for a show-of-authority Fourth Amendment "seizure." Rather, there must also be submission to that show of authority. *Hodari D.*, at 627-28.

* * *

As demonstrated above—and as the California Supreme Court in this case correctly concluded—a person

is "seized" within the meaning of the Fourth Amendment during a contact with police only if (1) the objective facts indicate that the officer's willful use of force or show of authority was directed at the person; (2) the police conduct would have communicated to a reasonable, innocent person that the person was not free to decline the officer's requests or otherwise terminate the contact; and (3) the person in fact was restrained or submitted to any show of authority.

D. Under These Principles, Petitioner Was Not "Seized" Under The Fourth Amendment When The Driver Of The Car In Which He Was Riding Complied With Deputy Brokenbrough's Routine Show Of Authority And Voluntarily Stopped The Car

Petitioner was a passenger in a car that was stopped in a routine manner by Deputy Brokenbrough. Under the principles set out above, petitioner was not "seized" within the meaning of the Fourth Amendment. He may not challenge the reasonableness of the stop, for it did not infringe on his own personal Fourth Amendment rights.

1. When stopping the driver, Deputy Brokenbrough directed no willful police action at petitioner

As explained above, the first inquiry in determining if a person has been subjected to a "seizure" of constitutional dimensions is whether, based upon the objective facts, the police conduct was willfully directed at the person claiming the protection of the Fourth Amendment. See *Brower*, 489 U.S. at 596-99. Here, however, any effect on petitioner's freedom was unintended and merely incidental to the stop of driver Simeroth.

The police stop of the vehicle in which petitioner was riding was done in a routine manner typical of traffic-violation investigations. By illuminating the patrol-car overhead lights, Deputy Brokenbrough in effect commanded the driver Simeroth to pull over. (JA 49-50.) The show of authority was intended to induce voluntary compliance by the driver with the officer's order. See *Brower*, 489 U.S. at 598. Failure to comply would have subjected Simeroth to legal consequences. See, *e.g.*, Cal. Vehicle Code §§ 2800, 2800.1 (requiring driver to pull over when signaled by law enforcement). The driver was the one the deputy was attempting to control through his show of authority. Indeed, the driver in control of the car is the only one who the officer could have realistically expected to submit to the show of authority.

This conclusion is reinforced by the pervasiveness of such routine stops. The public is familiar with the routine and they know that events typically confirm that the police were merely interested in investigating and citing the driver for a traffic violation. As the California Supreme Court recognized in this case, see *Brendlin*, 136 P.3d at 851 (JA 125), the nature of the typical stop strongly supports the proposition that, absent unusual circumstances, there is no reason for anyone present to assume that the initial police action is directed at anyone other than the driver. "While we are all familiar with the sinking feeling a driver experiences upon seeing police lights in the rearview mirror, few of us sense impending doom when we are in the passenger seat." *Id.*; see also *People* v. *Jackson*, 39 P.3d at 1185.

There was no reason to think that Deputy Brokenbrough's actions were directed at petitioner.

The deputy might not even have been aware of petitioner's presence. In many such stops executed in this routine way, the officer will not be aware of any passengers. And many passengers—for example, those who remain asleep—will not be aware of the police officer. Absent additional circumstances, the routine manner of the stop in this case could not have resulted in the seizure of anyone other than the driver.

It is not enough to say, as petitioner does, that the officer "intended" to stop the vehicle and everyone in it. Petr.'s Br. 17-20. As established above in the discussion of *Brower*, see pp. 9-14, *ante*, a Fourth Amendment "seizure" requires not merely that the police acted intentionally but also that the action was directed at a particular individual. Although Deputy Brokenbrough acted willfully in stopping the vehicle in which petitioner was traveling, petitioner was not the object of that police action. The fact that the stop of the vehicle was not an accident is of no moment: whether the deputy stopped the car on purpose or by accident, any effect on petitioner was only an "unintended consequence" of the officer's action. The officer's show of authority in the routine stop of a vehicle cannot by itself subject the passenger to "intentional acquisition" of police control through "means intentionally applied." See *Brower*, 489 U.S. at 596-97. Any intrusion on petitioner's liberty occasioned by the driver's compliance with the officer's show of authority was incidental or inadvertent and did not implicate his Fourth Amendment rights. See *Wilson*, 519 U.S. at 420 (Stevens, J., dissenting); *Jackson*, 39 P.3d at 1186.

2. A reasonable, innocent passenger would not have felt required to do anything in response to Deputy Brokenbrough's stopping of the car

The stop of the car in this case fails to meet a second requirement for a "seizure" of a person traveling as a passenger. Specifically, the deputy's actions would not have communicated to a reasonable, innocent person that he was not free to decline the deputy's requests or otherwise terminate any contact. See *Bostick*, 501 U.S. at 436-38. Petitioner disputes the applicability of this test, but his efforts are not persuasive.

a. Application of *Bostick* to the contact between petitioner and Deputy Brokenbrough during the stopping of the vehicle in this case leads to the conclusion that petitioner was not "seized" within the meaning of the Fourth Amendment. During the initial stopping of the vehicle, no command or request was directed from the officer to petitioner. Obviously, the officer commanded driver Simeroth to stop the vehicle; but, as explained above, that action was not directed at petitioner. The police action in stopping this vehicle did not compel petitioner to do anything. In a commonplace and typical stop such as this one, no reasonable person in petitioner's position would have felt coerced or compelled to do anything. There was nothing for a petitioner, as a passenger, to do.

Whether a reasonable person in petitioner's position might not have felt free to leave a moving vehicle is not, after *Bostick*, the relevant inquiry. The passenger's ability to avoid the police does not depend on his feeling free to leave the scene. *Bostick*, 501 U.S. at 436. "After all, an individual may manifest an unwillingness to engage with

the police not only by departing the area, but also by staying put and declining to answer questions or otherwise ignoring police inquiries." *Brendlin*, 136 P.3d at 852 (JA 126-27).

b. Petitioner asserts that a traffic stop is "a forcible physical restraint of an individual's 'freedom of action'" and not simply a "show of authority." Petr.'s Br. 8. He then argues that the *Bostick* "reasonable person" test is inapplicable to an encounter where an officer uses force to impede a citizen's movements. Petr.'s Br. 22-24. Petitioner's characterization of the police action is refuted, however, by this Court's discussion in *Brower*. There, the Court explained the differences between the roadblock used in that case and more-routine means such as were used here. This Court stated,

> In marked contrast to a police car pursuing with flashing lights or to a policeman in the road signaling an oncoming car to halt, a roadblock is not just a *significant show of authority* to induce a voluntary stop, but is designed to produce a physical stop by impact if voluntary compliance does not occur.

Brower, 489 U.S. at 598 (emphasis added) (citations omitted). "The pursuing police car sought to stop the suspect only by the *show of authority represented by flashing lights* . . . ." *Id.* at 597 (emphasis added). The Court viewed the use of a roadblock as akin to the use of physical force to restrain a suspect, and it distinguished a show of authority designed to produce "a voluntary stop." See also *Hodari D.*, 499 U.S. at 625-26 (officer's pursuit calling upon suspect to halt equals show of authority "seizure" if suspect complies).

Moreover, as noted at the outset of this brief, anomalous results would follow from petitioner's view that the simple fact of restraint on an individual's "freedom of action" settles the constitutional inquiry of whether a "seizure" has occurred. See p. 8, *ante*. Under petitioner's theory, all taxi cab and bus passengers would be "seized" under the Fourth Amendment when the cab or bus driver is pulled over by the police for running a red light. For, in what seems to be petitioner's view, those passengers would be subjected to a purposeful curtailment of their "freedom of action" whenever a police officer purposefully stops the cab or bus in which they were traveling. Equally anomalous, the same "seizure" characterization would attach in the case of passengers on a train or cruise ship if the police stopped the train or ship to investigate or cite the engineer or captain.

Petitioner would treat restraints on the mode of transport, without regard to such considerations as the coerciveness of the police action, as the key fact in determining whether a "seizure" has occurred. Cf. *Michigan* v. *Chesternut*, 486 U.S. at 573 ("[test] is . . . designed to assess the coercive effect of police conduct, taken as a whole . . ."). So, for example, passengers on a stationary bus who are prevented from proceeding immediately to their desired destination would not be "seized" when subjected, by armed officers, to questioning and requests to search luggage. Yet those same passengers, if on a bus that had left the station before being immediately stopped because the driver ran a stop sign, would be deemed "seized" merely on account of their presence in the stopped vehicle. No reasonable passenger would view the latter scenario as more intrusive on his liberty than the former—and yet the former situation does

not amount to a Fourth Amendment "seizure." *United States* v. *Drayton*, 536 U.S. at 203-05. Indeed, the curtailment of freedom of movement, if any, is arguably greater in this same "non-seizure" scenario. The bus passenger in the *Drayton* situation described above will be delayed from reaching his desired destination while the officers speak with perhaps all of the bus passengers. Thus it is possible he will be delayed for a longer period than passengers who are delayed while the officer simply cites the bus driver for running the stop sign.

This Court's cases, as argued above, demand more than a one-dimensional inquiry. If petitioner had been subjected to a show of authority in this case, a court hearing his claim should undertake the *Bostick* inquiry to determine the coercive effect of this interaction. See *Hodari D.*, 499 U.S. at 627-28; see also *Bostick*, 501 U.S. at 436-37 (test applies to all police-citizen interactions involving show of authority regardless of where they take place); *Michigan* v. *Chesternut*, 486 U.S. at 574 ("test is flexible enough to be applied to the whole range of police conduct in an equally broad range of settings . . .").

3. Petitioner did not submit to a police show of authority just because the driver complied with the deputy's command to stop the car

The final requirement for a Fourth Amendment "seizure" is submission to the show of authority. *Hodari D.*, 499 U.S. at 626-27. As a passenger in a vehicle during its routine stop by police, petitioner did not submit to the officer's show of authority. It was not for petitioner to respond to the officer's show of authority in this case. A passenger might object vociferously to the driver's

submission, but "[t]he passenger simply has no say in the matter." *Brendlin*, 136 P.3d at 852. (JA 125-26.) "The stop of the passenger is merely an unavoidable result of the driver's acquiescence in the police officer's command." *Jackson*, 39 P.3d at 1185. But she has not submitted to the officer's show of authority and is therefore not "seized." *Id.*

For example: During the driver's compliance with the officer's command to stop the car, a passenger repeatedly might make it known that she does not want the driver to stop and she indeed might leap from the car and immediately flee from the scene. It would make little sense to say that the passenger was "seized" by the driver's stopping of the vehicle. Under petitioner's simplistic "curtailment" formula, see Petr.'s Br. 8, 21-24, however, the passenger in such circumstances anomalously would be "seized" as her freedom of movement was curtailed during the driver's submission. Or, taking the hypothetical one step further: The passenger might want the driver to stop, but the driver might refuse and attempt to evade the police officer. No one could reasonably argue that the passenger was "seized" because she somehow had submitted to the show of authority.

Even after the stop itself, the passenger does not necessarily submit by simply remaining in the vehicle in the absence of some police action directed at him. His choice to remain says nothing about whether the police action had compelled him to do so or whether he simply chose to remain where he had been, perhaps because it would be more convenient or because his business is with the driver. *Brendlin*, 136 P.3d at 852 (citing *Bostick*, 501 U.S. at 436). (JA 126.)

For the same reasons that he claimed that *Bostick* is inapplicable—i.e., that this case allegedly involves the physical accosting of the vehicle and its occupants—petitioner argues that the *Hodari D.* requirement of submission to a show of authority is also inapplicable. Petr.'s Br. 21. But, again, a routine traffic stop involves a show of authority designed to produce voluntary compliance. See *Brower*, 489 U.S. at 598. Therefore, the *Hodari D.* test applies. *Hodari D.*, 499 U.S. at 626.

Under *Hodari D.*, in sum, petitioner was not "seized" merely by the driver's submission to the show of authority in the routine police stopping of a vehicle.

4. Petitioner's other objections are unpersuasive

Although the State's analysis of the question, as set out above, answers the bulk of petitioner's contentions, some remaining ones may be briefly addressed individually as follows:

a. Petitioner relies on dicta from this Court's decisions to support his view that a passenger is necessarily "seized" by a routine police stop of a vehicle. In particular, petitioner cites to dicta in *Delaware* v. *Prouse*, 440 U.S. 648 (1979), *Whren* v. *United States* 517 U.S. 806 (1996), and *Maryland* v. *Wilson*, 519 U.S. 408. Petr.'s Br. 10-13. None of these cases provides significant support for his position.

Although *Prouse* is often cited as authority for the view that a passenger is "seized" during a routine traffic stop, see Petr.'s Br. 11-13; *Brendlin*, 136 P.3d at 850 (JA 122), a passenger's ability to contest the legality of the

stop of the vehicle was neither litigated nor decided in that case.[3] The parties' briefing assumed that Prouse had been the driver of the car. This Court stated that it had granted certiorari to settle a split in the circuits over the validity of the police practice of stopping cars without any founded suspicion to check drivers' licenses and vehicle registrations. 440 U.S. at 650-51. It did not discuss any question of a passenger's "standing" to challenge the practice or of the passenger's "standing" versus that of the driver.

For those reasons, petitioner reads too much into *Prouse's* statement that "stopping an automobile and detaining its occupants constitutes a 'seizure'" under the Constitution. 440 U.S. at 653. Moreover, in that passage of its opinion, the Court relied on cases in which all occupants of a vehicle—passengers and driver—had at some point become the object of the officers' suspicionless detentions. *Id.*, citing *Martinez-Fuerte*, 428 U.S. at 556-58; *Brignoni-Ponce*, 422 U.S. at 876-78. *Prouse* does not settle the question of whether the stopping of a vehicle in a routine manner in and of itself results in a Fourth Amendment "seizure" of a passenger.

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[3] The conclusion that the issue was not decided by this Court is supported by the case documents in *Prouse*. In their briefs on the merits, both parties acknowledged that Prouse had been the driver of the car stopped by the New Castle County patrol officer. *Delaware* v. *Prouse*, No. 77-1571, Brief for the State of Delaware, 1978 WL 223148 at 3; *Delaware* v. *Prouse*, No. 77-1571, Brief for Respondent, 1978 WL 223149 at 3. The Supreme Court of Delaware and the Superior Court of Delaware also had identified Prouse as the driver. *State* v. *Prouse*, 382 A.2d 1359, 1361 (Del. 1978); *State* v. *Prouse*, No. 176-12-0213, 1977 WL 364586 at 1 (Del.Super., March 10, 1977).

Likewise unpersuasive is petitioner's citation to this Court's statement in *Whren*, 517 U.S. at 809-10, that "temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' . . . ." Petr.'s Br. 11. As with *Prouse*, the issue of a passenger's "standing" was neither litigated nor decided in *Whren*. The issue in *Whren*, instead, was the validity of a "pretext stop."[4] *Whren* does not hold that a detention of a passenger necessarily occurs by virtue of a routine traffic stop.

Petitioner also relies on *Maryland* v. *Wilson*, 519 U.S. 408. Petr.'s Br. 11-12. In *Wilson*, the Court merely held that an officer making a routine traffic stop may, as a matter of course, order passengers out of a lawfully stopped car to ensure officer safety. 519 U.S. at 414-15. The Court in *Wilson* did not hold that the mere stop of the car "seized" the passenger. In fact, it may be inferred that the majority in *Wilson* declined to treat the passenger as

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[4] The "question presented," as framed by the petitioners Whren and Brown, was "[w]hether a pretextual traffic stop undertaken by plainclothes vice officers who were prohibited by police department regulations from making routine traffic stops was objectively unreasonable under the Fourth Amendment where no reasonable officer in those circumstances would have made such a stop." Brief for Petitioners, *Whren* v. *United States*, 95-5841, 1996 WL 75758 at i. The "question presented" in the respondent's brief was "[w]hether the stop of petitioners' vehicle after police officers observed the driver commit traffic violations violated the Fourth Amendment." Brief for Respondent, *Whren* v. *United States*, 95-5841, 1996 WL 115816 at i. The Court stated: "In this case we decide whether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws." *Whren*, 517 U.S. at 808.

automatically "seized." The majority framed the question as whether the intrusion on the passenger's liberty occasioned by the officer's order was justified. *Id.* at 413-14. But, if a passenger were thought to be "seized" merely by the stopping of the car, the majority would likely have framed a different question, i.e., whether a passenger's *continued* detention could be justified on the basis of officer safety. There is, however, no discussion of a continuing detention in the Court's opinion. Moreover, the majority's reference to Maryland's request that the Court permit the forcible detention of the passenger for the duration of the stop, *id.* at 415, n.3, would have been superfluous if the passenger already had been detained by the stop.

In his dissenting opinion in *Wilson*, Justice Stevens was explicit. His dissent observed that any

> intrusion on the passengers' liberty occasioned by the initial stop of the vehicle . . . was a necessary by-product of the lawful detention of the driver. But the passengers had not yet been seized at the time the car was pulled over, any more than a traffic jam caused by construction or other state imposed delay not directed at a particular individual constitutes a seizure of that person.

Wilson, at 420 (Stevens, J., dissenting.)

Petitioner retorts by citing the *Wilson* Court's statement that, "as a practical matter, the passengers are already stopped by virtue of the stop of the vehicle." Petr.'s Br. 12 (quoting *Wilson*, 519 U.S. at 414.) But to say that the passenger was stopped as a "practical matter" begs the question of whether he was seized as a legal matter. The

Court in *Wilson* did not state that the passenger was *detained* by the stop of the car as a *constitutional* matter.

Petitioner further argues that the holding in *Wilson* could not be justified in the absence of a finding that the passenger was detained by the stopping of the vehicle. Petr.'s Br. 12. He is mistaken. Even if the initial Fourth Amendment intrusion on Wilson's liberty was the officer's order to get out of the car, rather than the stop of the car, that initial intrusion was justified by the weighty interest in officer safety. *Wilson*, 519 U.S. at 414-15. In *Michigan* v. *Summers*, 452 U.S. 692 (1981), this Court found that the same officer-safety interest justified an initial Fourth Amendment intrusion upon the defendant, who was prevented from leaving the premises that the police had arrived to search pursuant to a warrant. *Id.* at 702-03. Contrary to petitioner's reading, the Court did not consider the intrusion on Summers to be limited because he already had been "seized" and was merely relocated. Rather, the Court considered the initial detention of Summers to be "only an incremental intrusion on personal liberty" because of the circumstances surrounding the detention and its limited nature. *Id.* at 701-03.

b. Petitioner's professed concerns regarding the constitutional protections available to vehicle passengers also fail to justify his position. Passengers in vehicles stopped by police in a routine manner would not be without constitutional protections simply because the stop itself does not implicate their Fourth Amendment rights. Once the officer either by word or deed directs action at the passenger in some way, the passenger's Fourth Amendment rights may be implicated. But the routine stopping of the vehicle *without more* is not a "seizure" of a passenger.

If a "seizure" indeed occurs as a consequence of police action directed at the passenger after the stop, the passenger will of course be able to challenge whether it was reasonable. In assessing that, a court may be required to consider the "totality of the circumstances." *Wilson*, 519 U.S. at 411. Those circumstances could include the stop of the vehicle itself. As noted earlier, the Court in *Wilson* held that an officer's order to a passenger to exit a vehicle is reasonable under the Fourth Amendment as a matter of course based upon officer-safety concerns where the stop of the car was *lawful*. *Id.* at 410. Thus, a seized passenger well might litigate the lawfulness of the stop indirectly where police action directed at him implicated his own personal Fourth Amendment rights. That is very different, however, from saying that a passenger may challenge a vehicle stop on the theory that his own Fourth Amendment rights were implicated merely by the stopping of the vehicle. Cf. *Michigan* v. *Summers*, 452 U.S. at 694-95 (Summers could challenge his detention but not the probable cause supporting the search warrant being executed when he was detained). Here, of course—as explained below, see pp. 34-35, *post*—petitioner's arrest was independently justified and "reasonable" based upon the valid arrest warrant. So, he would be unable to litigate the lawfulness of the stop.

Passengers retain other protections too. Under *New York* v. *Belton*, 453 U.S. 454, 460-61 (1981), neither the passenger nor his belongings may be searched during the stop without lawfully-acquired cause justifying an arrest or a search. See *Wyoming* v. *Houghton*, 526 U.S. 295, 302 (1999). In addition, as noted just last Term in *Hudson* v. *Michigan*, 126 S. Ct. 2159, 2168 (2006), the increasing professionalism of police departments will serve to deter

police officers from stopping vehicles wholly without justification. Moreover, the threat of a 42 U.S.C. § 1983 civil rights action by the driver deters police officers from unlawfully stopping cars on the road. See *id.* at 67-68. Finally, the American Civil Liberties Union's stated concern about possible discriminatory use of traffic stops, see ACLU Br. 12-23, is best answered by *Whren* v. *United States*, 517 U.S. 806. There, the Court reaffirmed that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause not the Fourth Amendment." *Id.* at 813.

c. Petitioner suggests that the Fourth Amendment exclusionary rule itself provides a reason for "[p]ermitting a passenger to move to suppress the fruits of an unreasonable traffic stop." Petr.'s Br. 26. But it is a violation of the Fourth Amendment that results in application of the exclusionary rule: the rule does not define a constitutional claim. "The sole office of the exclusionary rule . . . is to prevent the admission of evidence at trial, not to define constitutional rights or violations." *Reich* v. *Minnicus*, 886 F.Supp. 674, 681-82 (S.D. Ind. 1993).

Fourth Amendment rights are personal, *Rakas* v. *Illinois*, 439 U.S. 128, 138-39 (1978): under a given set of facts, a person is either "seized" in the constitutional sense or he is not. A passenger cannot be permitted "to move to suppress the fruits of an unreasonable traffic stop" simply because it might further the aims of the exclusionary rule itself. "Whether the exclusionary sanction is appropriately imposed in a particular case, . . . is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" *United States* v. *Leon*, 468 U.S. 897, 906 (1984)

quoting *Illinois* v. *Gates*, 462 U.S. 213, 223 (1983)); accord, *Hudson* v. *Michigan*, 126 S. Ct. at 2164.

Application of the exclusionary rule requires that there was "evidence obtained in violation of the Fourth Amendment." *United States* v. *Calandra*, 414 U.S. 338, 347 (1974). "[T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *Id.* at 348. If petitioner was not detained as a passenger in a routine traffic stop of the driver, then his Fourth Amendment rights were not implicated. The exclusionary rule does not provide an independent means of permitting him "to move to suppress the fruits" of the stop of the driver.

d. Petitioner asserts, improbably, that driver Simeroth acted as Deputy Brokenbrough's "agent" in "seizing" him as if in a container. Petr.'s Br. 20-21. But stopping a car is different from seizing it. See *Illinois* v. *Caballes*, 543 U.S. 405, 409 (2005). The deputy certainly did not seize the car as evidence or as an instrumentality of a crime. Moreover, people are not "effects" under the Fourth Amendment. Cf. *United States* v. *Jacobsen*, 466 U.S. 109, 114 (1984) (parcels are "effects in which the public at large has a legitimate expectation of privacy"). People may say no to an officer, or they may otherwise avoid or terminate any mere contact with an officer. Anyway, Simeroth was the object of Deputy Brokenbrough's police action, not his civilian agent.

E. Petitioner Was Not "Seized" Until The Officer Ordered Him Out Of The Vehicle At Gunpoint And Arrested Him Under The Outstanding Warrant; As That Arrest Was Lawful, Evidence Obtained Incident To That Arrest Was Not Subject To Suppression

Petitioner was not detained by the stopping of the car. His subsequent detention and the discovery of the challenged evidence were entirely proper.

As a passenger, petitioner's rights under the Fourth Amendment were not implicated by the search of his co-defendant's vehicle. *Rakas* v. *Illinois*, 439 U.S. 128 at 134. Therefore, he cannot complain about the items seized therein. Moreover, evidence from petitioner's person was discovered properly in a search incident to his arrest on a valid warrant. See *United States* v. *Robinson*, 414 U.S. 218, 225-27 (1973). Petitioner, indeed, has not suggested that the arrest was unlawful. His lawful arrest also gave the officers the right to search the passenger compartment of the vehicle in which he was riding and any containers found therein. *New York* v. *Belton,* 453 U.S. at 460-61.

No evidence suggests that petitioner was detained prior to that point. Deputy Brokenbrough merely exited his vehicle and approached the driver. His only contact with petitioner, prior to the arrest, was to ask him his name. After the vehicle was initially stopped, and until probable cause developed, petitioner was not physically restrained by Deputy Brokenbrough. Until the deputy had established probable cause to arrest petitioner, there was no application of force, no intimidating police conduct, no overwhelming show of force, and no brandishing of weapons. See *Drayton*, 536 U.S. at 204. The deputy's use

of the spotlight to illuminate the nighttime scene was natural and innocuous.

Nor did the deputy engage in any show of authority that would lead a reasonable, innocent person to believe he was not free to go or otherwise avoid the officer. See *Bostick*, 501 U.S. at 436-39. No weapons were brandished, no commands issued, and no exits were blocked. In fact, petitioner had opened the passenger door at one point before apparently deciding to remain in the vehicle. (JA 38-39.) None of the officer's actions prior to the arrest of petitioner would have suggested to a reasonable, innocent passenger that this was anything other than a routine-manner traffic stop.

Further, the time frame was short. After stopping the vehicle, Deputy Brokenbrough immediately made contact with the occupants. Upon recognizing petitioner, he immediately checked with dispatch and, within three minutes from the initial stop, he determined that petitioner was a parolee subject to an arrest warrant. (JA 39.) Only at this point did Deputy Brokenbrough order petitioner out of the car with a show of force that would have left a reasonable person feeling compelled to submit to the officer's authority. When petitioner submitted to this show of authority, he was "seized" within the meaning of the Fourth Amendment. *Hodari D.*, 499 U.S. at 626. Until then, petitioner was—absent some directive that resulted in his "seizure"—free to go.[5]

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[5] Petitioner and Amici The National Association of Criminal Defense Lawyers (NACDL) disagree with the notion that, absent some directive from the officer, a passenger like petitioner is free to go once the car is stopped. They assert that, because many courts have extended this Court's holding in *Wilson* to find that officers *may* fully

(Continued on following page)

The fact that petitioner chose to remain does not demonstrate that the police coerced or compelled him to do so. After all, the reasonable, innocent passenger may not want to leave the vehicle for a variety of reasons. See *Bostick*, 501 U.S. at 436. Moreover, a person need not leave the scene in order to avoid the police and go about his business. Petitioner's business was, prior to the stop, in the car. Petitioner, or the reasonable innocent passenger could have gone about his business by remaining in the car. "After all an individual may manifest an unwillingness to engage with the police not only by departing the area, but also by staying put and declining to answer questions or otherwise ignoring police inquiries." *Brendlin*, 136 P.3d at 852. (JA 126-27.) It was, however, this element of choice that distinguished petitioner at this time from Ms. Simeroth who was not free to go. See *Jackson*, 29 P.3d at 1185. Thus, until the time of his arrest, petitioner's encounter with the deputy after the actual stop of the vehicle was consensual and did not implicate the Fourth Amendment. See *Bostick*, 501 U.S. at 434.

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control the movements of passengers either by ordering them to remain in the car or by keeping them at the scene, passengers therefore are, in fact, "seized." Petr.'s Br. 7; NACDL Br. 12-14. While those courts were correct in extending the *Wilson* holding to permit full control by the officer as a matter of course after a lawful routine traffic stop, see *United States* v. *Williams*, 419 F.3d 1029, 1030-31 (9th Cir. 2005), it does not follow that, because of this authority, a passenger is automatically "seized." See generally, *Michigan* v. *Summers*, 452 U.S. at 702-03 ("the risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation"; however, a detention does not occur until the officers exercise that control.) The passenger is not "seized" merely because the officer possesses the power to "seize" him. See *Brendlin*, 136 P.3d at 854. (JA 130.)

II. Even If Petitioner Were Unreasonably Seized Solely On Account Of The Traffic Stop, The Evidence Obtained At The Scene Would Not Be Subject To Suppression

In any event, the challenged evidence in this case was admissible. This Court has consistently rejected a rule that would require the suppression of evidence merely because there was a connection between the discovery of the evidence and a violation of the Fourth Amendment. As this Court stated in *United States* v. *Leon*, "[w]e have declined to adopt a per se or 'but for' rule that would render inadmissible any evidence that came to light through a chain of causation that began with an illegal arrest." 468 U.S. at 910-11; See also *Hudson* v. *Michigan*, 126 S. Ct. at 2164; *United States* v. *Ceccolini*, 435 U.S. 268, 274-75 (1978); *Wong Sun* v. *United States*, 371 U.S. at 481, 487-88 (1963). The exclusion of evidence somehow connected with a Fourth Amendment violation requires at a minimum a causal connection between the illegal conduct and the evidence sought to be suppressed: mere physical causation is not enough. Once a connection between the evidence and the illegality has been established, the court still must examine the closeness of the connection to determine whether the evidence may be admissible. The test is whether "the chain of causation proceeding from the unlawful conduct has been so attenuated or has been interrupted by some intervening circumstance so as to remove the 'taint' imposed upon that evidence by the original illegality." *United States* v. *Crews*, 445 U.S. 463, 471 (1980).

In *Brown* v. *Illinois*, 422 U.S. 590, 603-04 (1975), this Court set forth factors to consider in determining whether the "taint" of a primary illegality has been sufficiently

attenuated: (1) the time between the illegal police conduct and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the police misconduct. Here, two factors dilute any taint. First is the significant intervening factor of petitioner's arrest under a valid pre-existing warrant. Unlike other situations involving allegedly intervening factors, the arrest of petitioner was not the result of the situation created by the original police illegality. See *id.* at 603-05. Rather, the arrest was the result of prior conduct by petitioner giving rise to the warrant.

Moreover, the police misconduct, if any, in detaining petitioner was not flagrant. The officer did not know who petitioner was when he stopped the car, and the stop was nonviolent and brief. When taken together, the intervening fact of petitioner's arrest and the lack of flagrancy in the officer's conduct in detaining petitioner are more than sufficient to attenuate any taint of the evidence obtained from the allegedly unlawful detention. See *United States* v. *Simpson*, 439 F.3d 490, 495 (8th Cir. 2006) (where "outstanding arrest warrant constitutes extraordinary intervening circumstances that purges much of the taint."); *United States* v. *Green*, 111 F.3d 515, 521 (7th Cir. 1997) ("It would be startling to suggest that because the police illegally stopped an automobile they cannot arrest an occupant who is found to be wanted on a warrant—in a sense requiring an official call of 'Olly, Olly, Oxen Free.'"); *State* v. *Frierson*, 926 So. 2d 1139, 1144 (Fla. 2006); *State* v. *Page*, 103 P.3d 454, 455 (Idaho 2004); *State* v. *Jones*, 17 P.3d 359, 361 (Kan. 2001); *State* v. *Hill*, 725 So. 2d 1282, 1286 (La. 1998).

It is true that, in petitioner's case, the evidence was discovered close in time to the allegedly unlawful

"passenger detention." But this case is unlike one where the proffered intervening act, such as a defendant's inculpatory statement or his consent to search, well might be the product of coercive police action in the carrying out of the detention or initial illegality. See *United States* v. *Green*, 111 F.3d at 522. Here, the separate intervening act of an arrest pursuant to a pre-existing warrant cannot be linked to any coercive police action.

Thus, even if petitioner had been unlawfully detained by the stop of the vehicle, the evidence obtained against him was not subject to suppression. It was not the tainted "fruit" of a "poisonous tree." See *Wong Sun* v. *United States*, 371 U.S. at 487.

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In sum, petitioner was merely a passenger in a vehicle that was stopped in a routine manner by the police to investigate a traffic infraction.[6] That stop occurred as a result of the driver's submission to the officer's show of authority. During the driver's submission, nothing in the officer's actions would have coerced or compelled a reasonable passenger to do anything. It was the driver, not petitioner, who submitted to the officer's command to stop the car. Aside from opening the car door at one point, petitioner merely remained where he had started, sitting in his front passenger seat.

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[6] The fact that the stop was later determined to be unjustified does not alter the conclusion that the manner of the police action in the stop itself was routine. It is the police action as it appeared at the time it occurred and not the later judicial determination of its propriety that is the relevant consideration. See *Hodari D.*, 499 U.S. at 627 n.3 (noting fundamental distinction between what action constitutes a "seizure" and whether there is acceptable justification for that "seizure").

Petitioner therefore was not "seized" within the meaning of the Fourth Amendment by the stopping of the car. As his own personal Fourth Amendment rights were not implicated by the stop, petitioner may not challenge whether the stop was reasonable. See *Rakas*, 439 U.S. at 133-34.

In any event, the discovery of the incriminating evidence was attenuated from the challenged stop. Instead, the discovery flowed from the search incident to petitioner's arrest under the pre-existing arrest warrant. The California Supreme Court correctly ruled that the exclusionary rule was inapplicable.

CONCLUSION

The judgment of the California Supreme Court should be affirmed.

Respectfully submitted,

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